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ALEXANDER E. STEVAS,
CLERK

82-326

NO.

in the
Supreme Court
of the
United States

JOSEPH ALBERT MAHANNA,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

H. DOHN WILLIAMS, JR.
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Hollywood, Florida 33020
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Attorneys for Petitioner

QUESTION PRESENTED

THE PETITIONER WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL, CONTRARY TO *GEDERS V. UNITED STATES*, 425 U.S. 80 (1976), WHEN THE TRIAL COURT ORDERED HIM NOT TO CONSULT WITH HIS ATTORNEY DURING A SEVENTEEN (17) HOUR OVERNIGHT RECESS.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Judgment and Opinion of the Court Below	2
Statement of Jurisdiction	2
Constitutional Amendments Involved	2
Statement of the Case	3
Reasons for Granting the Writ	3
Conclusion	7

TABLE OF AUTHORITIES

Page

Adams v. United States ex. rel. McCann,
317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268 (1942) 5

Barker v. Wingo,
407 U.S. 514, 92 S.Ct. 2182,
33 L.Ed.2d 101 (1972) 5

Boyd v. Dutton,
405 U.S. 1, 92 S.Ct. 759,
30 L.Ed.2d 755 (1972) 5

Boykin v. Alabama,
395 U.S. 238, 89 S.Ct. 1709,
23 L.Ed.2d 274 (1969) 5

Carnley v. Cochran,
369 U.S. 506, 82 S.Ct. 884,
8 L.Ed.2d 70 (1962) 5

Doughty v. Maxwell,
376 U.S. 202, 84 S.Ct. 702,
11 L.Ed.2d 650 (1964) ..... i, 6

Geders v. United States,
425 U.S. 80, 96 S.Ct. 1330,
47 L.Ed.2d 592 (1976) 5

Humphrey v. Cady,
405 U.S. 504, 92 S.Ct. 1048,
31 L.Ed.2d 394 (1972) 5

TABLE OF AUTHORITIES (Continued)

Page

Swenson v. Bosler,
386 U.S. 258, 87 S.Ct. 996,
18 L.Ed.2d 33 (1967) 5

United States v. Conway,
632 F.2d 641 (5 Cir. 1980) 7

NO.

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JOSEPH ALBERT MAHANNA,
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STATE OF FLORIDA,
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PETITION FOR WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

To: The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Petitioner, Joseph Albert Mahanna, prays a Writ of Certiorari issue to review a final judgment of the Fourth District Court of Appeal of Florida affirming the Petitioner's conviction in the Circuit Court of the Seventeenth Judicial Circuit of Florida.

JUDGMENT AND OPINION OF THE COURT BELOW

In a per curiam order without a written opinion, the Fourth District Court of Appeal of Florida affirmed the Petitioner's conviction in the Circuit Court of the Seventeenth Judicial Circuit of Florida. The Florida Rules of Appellate Procedure absolutely prohibit an appeal to, or petition of certiorari to the Florida Supreme Court if there is no written opinion by the District Court. Accordingly, the Petitioner appealed his conviction to the highest court allowed under the Appellate Rules of Procedure of Florida.

JURISDICTION OF THIS COURT

This Petition is filed within sixty (60) days of the Fourth District Court's denial of the Petitioner's petition for rehearing on July 12, 1982.

The jurisdiction of this Court is invoked, made and conferred under Title 28 U.S.C. §1257(3) and Rules 17 through 23 of this Court's rules.

CONSTITUTIONAL AMENDMENTS INVOLVED

Sixth Amendment, United States Constitution

Fourteenth Amendment, United States Constitution

STATEMENT OF THE CASE

The Petitioner was charged in three (3) separate Informations viz: (1) Circuit Court Case No. 80-500CF with the offense of Forgery of a Credit Card Receipt; (2) Circuit Court Case No. 80-1909CF with the offenses of Grand Theft by Unlawful Use of a Credit Card and Forgery of a Credit Card Receipt; and (3) Circuit Court Case No. 80-5319CF with the offense of Forgery of a Credit Card Receipt.

The three (3) Informations were consolidated for trial. After a jury trial, the Petitioner was found guilty of all the aforementioned charges. The trial court sentenced the Petitioner to a total period of incarceration of ten (10) years followed by fifteen (15) years probation.

The Petitioner's appeal to the Fourth District Court of Appeal of Florida of the issue raised herein was denied without opinion. Accordingly, there is no opinion included herein explaining the Appellate Court's reasoning.

REASONS FOR GRANTING THE WRIT

On the third day of trial when the trial recessed for the evening, the presiding judge ordered the Petitioner not to consult with his attorney during the overnight recess. This overnight recess was the last significant and lengthy recess before the last day of the trial. The following day, the Petitioner testified, the jury charge conference was held, closing arguments were heard,

and the jury retired to deliberate. The pertinent facts are as follows:

The trial began the morning of November 3, 1980. On the afternoon of November 4th, the Petitioner began calling witnesses on his behalf. Seven (7) witnesses testified for the defense. At approximately 5:10 p.m., counsel for the Petitioner informed the court that his final witness would be the Petitioner. He requested that the court recess so that the Petitioner could begin testifying the next morning. The court denied the request, and the Petitioner began testifying.

At approximately 6:00 p.m., the court recessed for the day. The court stated the trial would begin the next morning at 11:00 a.m., seventeen (17) hours later. Upon recessing, the court ordered the Petitioner not to discuss the case with his counsel. Petitioner's counsel acquiesed to the order. However, the record is silent as to whether the Petitioner agreed to waive his right to speak with his counsel during the overnight recess. Nowhere in the transcript did the Petitioner affirmatively waive his right to consult with and to seek the advice of this counsel during the seventeen (17) hour overnight recess.

The trial resumed the next morning shortly after 11:00 a.m. Counsel for the Petitioner stated that he had abided by the court's previous instruction, but that it had been necessary for him to speak with the Petitioner about trial strategy and the progression of the trial. The court agreed to allow counsel to speak with the Petitioner for a few moments. Nowhere in the record did Petitioner personally agree to this procedure. The

Petitioner never affirmatively waived his right to consult with his attorney during the previous overnight recess.

The law is clear that the right to counsel is a personal right that can only be waived by the individual. A waiver of the right to counsel must be intelligently and understandingly made, and will not be presumed from a silent record. *Adams v. United States ex. rel. McCann*, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268 (1942); *Carnley v. Cochran*, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962); *Swenson v. Bosler*, 386 U.S. 258, 87 S.Ct. 996, 18 L.Ed.2d 33 (1967); *Doughty v. Maxwell*, 376 U.S. 202, 84 S.Ct. 702, 11 L.Ed.2d 650 (1964); *Boykin v. Alabama*, 395 U.S. 238, 89, S.Ct. 1709, 23 L.Ed.2d 274 (1969); *Boyd v. Dutton*, 405 U.S. 1, 92 S.Ct. 759, 30 L.Ed.2d 755 (1972); *Humphrey v. Cady*, 405 U.S. 504, 92 S.Ct. 1408, 31 L.Ed.2d 394 (1972); and *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). There was no *personal* waiver of the right to consult with his counsel by the Petitioner.

The Petitioner was on trial for eight (8) felony charges, each stemming from a different set of circumstances. The Petitioner was the last witness to testify. At the conclusion of his testimony, after a brief jury instruction conference, closing arguments immediately began. The seventeen (17) hour, overnight recess, before the last day of trial, was the last significant and lengthy time period in which the Petitioner could discuss his case with counsel prior to jury deliberations. Aside from his testimony, there was needed discussion of trial strategy concerning jury instructions and closing argument. The Petitioner should have been afforded the opportunity to discuss with his counsel those things.

Particularly, in view of the fact that his counsel waived all instructions on lesser included offenses.

The Petitioner would rely upon *Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976), which is directly on point. The court stated:

> It was an overnight recess, 17 hours long. It is common practice during such recesses for an accused and counsel to discuss the events of the day's trial. Such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. The lawyer may need to obtain from his client information made relevant by the day's testimony, or he may need to pursue inquiry along lines not fully explored earlier. At the very least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day's events.
>
> 425 U.S. at 88, 96 S.Ct. at 1335.

See also *United States v. Conway*, 632 F.2d 641, at 645 (5 Cir. 1980) wherein the court ruled, ". . . we hold that depriving a criminal defendant of the right to consult with counsel during the Court recesses—regardless of how brief the recesses may be—violates the constitutional right to effective assistance of counsel." *Conway* involved a luncheon recess during cross-examination of the defendant.

CONCLUSION

By its decision, the Florida Appellate Court refused to follow, or deviated from this Court's previous pronunciation that a defendant's right to counsel shall not be hindered, restricted, or prohibited during an overnight recess of his trial.

Respectfully submitted,

H. DOHN WILLIAMS, JR.
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2432 Hollywood Boulevard
Hollywood, Florida 33020

Attorneys for Petitioner

Appendix

[RECEIVED APR 28 1982]

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA FOURTH DISTRICT
JANUARY TERM 1982

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING PETITION
AND, IF FILED, DISPOSED OF.

CASE NO. 81-452.

JOSEPH ALBERT MAHANNA,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

Decision filed April 28, 1982

Appeal from the Circuit Court for
Broward County; Mel Grossman,
Judge.

H. Dohn Williams, Jr., of Varon
and Stahl, P.A., Hollywood, for
appellant.

Jim Smith, Attorney General, Tallahassee, and Marlyn J. Altman, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

AFFIRMED.

LETTS, C.J., DOWNEY and WALDEN, JJ., concur.

[RECEIVED JUL 6 1982]

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT

JOSEPH ALBERT MAHANNA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 81-452

July 2, 1982

BY ORDER OF THE COURT:

ORDERED that Appellant's May 17, 1982 Petition for Rehearing is stricken as untimely.

I hereby certify the foregoing is a
true copy of the original court order.

Debbie Picklesimer
for CLYDE L. HEATH,
CLERK.

cc: H. Dohn Williams, Jr., Esq.

Marlyn J. Altman, Assistant Attorney General

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FILED
NOV 15 1982
ALEXANDER L. STEVAS,
CLERK

NO. 82-326

IN THE
SUPREME COURT OF THE UNITED STATES

October term, 1982

JOSEPH ALBERT MAHANNA,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT

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Counsel of Record

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Counsel for Respondent

QUESTION PRESENTED

WHETHER THE PETITIONER WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL, CONTRARY TO GEDERS V. UNITED STATES, 425 U.S. 80 (1976), WHEN THE TRIAL COURT ORDERED HIM NOT TO CONSULT WITH HIS ATTORNEY DURING A SEVENTEEN (17) HOUR OVERNIGHT RECESS?

I N D E X

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITATIONS	iii
STATEMENT OF THE CASE . . .	1
ARGUMENT AGAINST GRANTING THE WRIT	2-8
I. THE PETITIONER WAS NOT DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.	
CONCLUSION	9
CERTIFICATE OF SERVICE . .	10

TABLE OF CITATIONS

Cases	PAGE
Bova v. State, 410 So.2d 1343 (Fla. 1982)	6
Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)	6
Geders v. United States, 425 U.S. 80 (1976)	i,5
Harrington v. California, 395 U.S. 250 89 S.Ct. 1726, 23 L.Ed. 284 (1969).	6
United States v. Hakkard, 603 F.2d 137 (10th Cir. 1979)	4

STATEMENT OF THE CASE

Respondent accepts the Petitioner's statement of the case.

ARGUMENT AGAINST GRANTING THE WRIT

I.

THE PETITIONER WAS NOT DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Sometime before 6:00 p.m., while the Petitioner was testifying, defense counsel requested that the jury be excused for a moment so that counsel could discuss an issue out of the hearing of the jury. When the jury was brought back into the courtroom the bailiff presented the judge with a note indicating that one of the jurors wasn't feeling well. Consequently the court decided to recess for the evening and stated the trial would begin the next morning at 11:00 a.m., seventeen hours later.

Thereupon, the trial judge in-

structed that the Petitioner not to discuss his testimony with anyone. Defense counsel was specifically asked if he wanted to discuss anything with his client. Counsel specifically stated that he had no objection to the court's instruction.

Respondent agrees that it was error for the trial judge to instruct defense counsel not to confer with Petitioner during the overnight recess. However, Respondent maintains that in light of the fact that defense counsel specifically stated that he had no objection to the procedure, the error should be deemed harmless. That Petitioner should assert on appeal that he was prejudiced by the court's instruction is an anomaly in view of the fact that counsel announced

he had other matters to attend to (indicating that he had no intention of conferring with his client that evening).

As a general rule, if the accused fails to alert the trial court to claimed error, the issue cannot be raised for the first time on appeal. Unless a party is required to timely object before the trial court, the trial judge and opposing counsel are deprived of an opportunity to take corrective action, if such be required, in order to assure an orderly, fair and proper trial. In sum, a party may not sit idly by at trial watching error being committed, and complain for the first time on appeal. United States v. Hakkard, 603 F.2d 137 (10th Cir. 1979).

In essence, Respondent is asking this Court to decline to adopt a per se rule that any limitation on counsel - petitioner consultation is constitutional error requiring reversal without regard to the harmless error rule. It is Respondent's position that the case at bar is distinguishable from Geders v. United States, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed. 2d 592 (1976) because in that case petitioner's attorney objected to the improper restraint on his consultation with his client. Sub judice, counsel was asked if he had objection to the procedure and he stated that he did not. Based on the circumstances at bar, Respondent maintains that no prejudice accrued to Petitioner as a result of the error

which should therefore be considered harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969); Bova v. State, 410 So.2d 1343 (Fla. 1982).

Petitioner asserts that the right to counsel is a personal right that can only be waived by the individual and waiver will not be presumed from a silent record. However, the record sub judice is not silent. Defense counsel stated he had no objection to the overnight procedure. The Petitioner either by himself or through his attorney, expressed no desire for consultation. The next morning however, counsel asked to be allowed to consult with his

client and stated that he was making the request, at the request of his client. The court acceded to the request and granted a short recess (R. 621-623).

The inference is clear on the basis of this incident that had the Petitioner wanted to consult with his attorney, he would have related that desire to the attorney who would have informed the court accordingly.

As Respondent understands it, harmless error occurs when a mistaken ruling, that is, a trial court decision which affects the conduct of the proceedings in some way, is shown not to have affected the final result of the litigation. Sub judice, there is no indication that counsel or Petitioner had any desire to speak to the other

which was precluded by the court's announcement. In a case such as this where a trial court's ruling, however erroneous, has no causative impact on what actually happened or did not happen below, that erroneous ruling cannot reasonably be said to justify a reversal.

CONCLUSION

For these reasons, Respondent respectfully requests that the instant Petition for Writ of Certiorari to the District Court of Appeal, Fourth District, State of Florida, be denied.

Respectfully submitted,

JIM SMITH
Attorney General

JOY B. SHEARER
Assistant Attorney General
Counsel of Record

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111 Georgia Avenue-Suite 204
West Palm Beach, Florida 33401
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Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of _____, 1982, three copies of the foregoing has been furnished, by United States Mail, to H. Dohn Williams, Jr., Esquire, c/o Varon and Stahl, 2432 Hollywood Boulevard, Hollywood, Florida 33020.

_____
JOY B. SHEARER